Supreme Court, U.S.
FILED
MAY 17 1996
CLERK

(3)

No. 95-1679

In the Supreme Court of the United States

OCTOBER TERM, 1995

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,
PETITIONER,

v.

CHAULK SERVICES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ARTHUR P. MENARD
MENARD, MURPHY & WALSH
One Financial Center
Boston, MA 02111
(617) 832-2500

Blanchard Press, Inc., Boston, Mass — Law Printers (617) 426-6690

20 pp

I

STATEMENT OF INTERESTED PARTIES

Respondent in this action is Chaulk Services, Inc. which, as of December 1, 1995 has been d/b/a American Medical Response Massachusetts, Inc., a Massachusetts corporation.

TABLE OF CONTENTS

	Page
Statement of Interested Parties	I
Table of Authorities	v
Statement of Jurisdiction	1
Statement of the Case	2
Corrections of Misstatements in the Petition	4
Argument	5
I. Under The Garmon Doctrine, State Action Is Preempted Where The Conduct In Issue Is Arguably Subject To The National Labor Relations Board	7
A. The First Circuit did not hold that the NLRB preempts the MCAD in gender discrimination cases.	10
B. References to Title VII and the EEOC are also inapposite in this case	11
C. Comity deference is a two-way street	11
II. The Case Was Properly Decided Under Applicable Supreme Court Abstention Doctrine	12
Conclusion	15

TABLE OF AUTHORITIES

Cases

Page

Allegheny Corp. v. *Haase*, 986 F.2d 1046 (7th Cir. 1990), *reh'g denied*, 1990 U.S. App. LEXIS 5250 (7th Cir. 1990) 14

Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. *Lockridge*, 403 U.S. 274 (1971) 9

Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983) 8

Britt v. *Grocers Supply Co., Inc.*, 978 F.2d 1441 (5th Cir. 1992), *reh'g denied*, 986 F.2d 97 (5th Cir. 1993), *cert. denied*, 508 U.S. 960 (1993) 11

Bud Antle, Inc. v. *Barbosa*, 35 F.3d 1355 (9th Cir. 1994) modified, 45 F.3d 1261 (9th Cir. 1994) 14

Building Trades Council (San Diego) v. *Garmon*, 359 U. S. 236 (1959) 7, 9, 10, 11, 14, 15

Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943), *rehearing denied*, 320 U.S. 214 (1943) 6,13

California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) 8

Colorado River Water Conserv. Dist. v. *United States*, 424 U.S. (1976) 12, 13

Evans v. *Dale*, 896 F.2d 975 (5th Cir. 1990), *reh'g denied*, 1990 U.S. App. LEXIS 6352 (5th Cir. 1990) 14

Fragoso v. *Lopez*, 991 F.2d 878 (1st Cir. 1993)..... 14

Hazardous Waste Treatment Council v. *South Carolina*, 945 F.2d 781 (4th Cir. 1991) 14

Local 1926 International Union of Operating Engineers v. *Jones*, 460 U.S. 669 (1983)..... 7

Mass. Electric v. *Mass. Comm'n Against Discrimination*, 375 N.E.2d 1192 (1978)..... 5

Mitchell v. *Collagen Corp.*, 870 F.Supp. 885 (D.C. Ind. 1994), *aff'd*, 67 F.3d 1268 (7th Cir. 1955) *reh'g denied*, 1995 U.S. App. Lexis 32924 (7th Cir. 1995) 10

N.L.R.B. v. *State of Ill. Dept. of Emp. Sec.*, 988 F.2d 735 (7th Cir. 1993)..... 8

Page

New Orleans Public Service, Inc. v. *Council of the City of New Orleans*, 491 U.S. 350 (1989) 5, 6, 13, 14

Norfolk & Western Railway Co. v. *Public Utilities Commission of Ohio*, 926 F.2d 567 (6th Cir. 1991), *reh'g denied*, 1991 U.S.App. LEXIS 7104 (6th Cir. 1991) 14

Sears, Roebuck Co. v. *San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978) 7

Seneca-Cayuba Tribe of Oklahoma v. *State of Oklahoma*, 874 F.2d 709 (10th Cir. 1989) 8

Sycuan Band of Mission Indians v. *Roache*, 54 F.3d 535 (9th Cir. 1994), *cert. denied*, __ U.S.__, 133 L.Ed.2d 203 (1995) 8

Tamburello v. *Comm-Tract Corp.*, 67 F.3d 973 (1st Cir. 1995) 11

Trailer Marine Transport Corp. v. *Rivera-Vazquez*, 931 F.2d 961 (1st Cir. 1991) 14

Williams v. *North Carolina*, 325 U.S. 226 (1945), *reh'g denied*, 325 U.S. 895 (1945) 13

Younger v. *Harris*, 4011 U.S. 37 (1971) ... 5, 6, 11, 13

Statutes

42 U.S.C.A. §§ 2000e-2000e-17 2

National Labor Relations Act, § 7 ..... 3, 7, 9

§8 7

§8(a)(1) 2, 3, 9

§8(a)(3) 2, 3

Miscellaneous

James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Docrtine*, 46 Stan.L.Rev. 1049 (1994) 12

In the
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1679

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
PETITIONER,

v.

CHAULK SERVICES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests this Court deny the Petition for a Writ of Certiorari which seeks review of a decision of the United States Court of Appeals for the First Circuit entered on November 27, 1995. A petition for rehearing *en banc* was denied on January 18, 1996.

STATEMENT OF JURISDICTION

Jurisdiction to review the decision of the Court of Appeals is properly invoked under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

This case involves an appeal from a decision of the United States Court of Appeals for the First Circuit.[1]

On December 1, 1993, Petrina Doulamis/Sullivan (Doulamis) filed a Complaint with the Massachusetts Commission Against Discrimination (Commission) alleging unlawful discrimination against her in violation of Mass. Gen. L. ch. 151B, §4 and Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§2000e—2000e-17 (West 1994 & Supp. 1995) Pet.App.11A. In that Complaint she stated, *inter alia*, "(o)n November 10, 1993, I was harassed about my union activity. I believe the reason is because I am a female." Pet.App.42A. After alleging certain discriminatory activities by Chaulk on November 10, 15, and 29, 1993, she concluded, "I believe that I am being single (*sic*) out by the Respondent because I am a female. There are numerous other male organizers who are not being harassed." Pet.App.43A. On or about December 2, 1993, Eric Burgess, a co-worker of Doulamis and fellow union organizer, was suspended by Chaulk. Pet.App.10A.

Contemporaneously, on December 9, 1993, the International Association of EMTs & Paramedics, affiliated with NAGE (AFL-CIO), (Union) filed a charge with the National Labor Relations Board (NLRB) alleging that Chaulk had discriminated against Doulamis because of her union activity. Pet.App.9A.

Thereafter, on February 3, 1994, the NLRB issued a Complaint against Chaulk based on the December 9 filing by the Union. In that Complaint, the NLRB specifically alleged that Chaulk had violated §§8(a)(1) and (3) of the National Labor Relations Act (NLRA) and had interfered with, restrained and

---

[1] All "Pet.App." references are to the Appendix. All "Pet." references are to the Petition.

coerced employees in the exercise of their rights guaranteed in §7 of the Act.[2]

The Complaint, alleged that, about November 29, 1993, Chaulk issued a written warning to its employee, Petrina Doulamis, and about December 7, 1993, Chaulk issued a letter to its employee, Petrina Doulamis, threatening her with discipline if she attended any future 401(K) meetings held by Chaulk with its employees. Pet.App.9A-10A. The Complaint went on to assert that Chaulk engaged in the alleged discriminatory conduct because it mistakenly believed that employees were engaged in misconduct arising out of union or other protected concerted activity. Pet.App.10A.

Chaulk filed its Answer in that case on November 16, 1994, denying each and every allegation that it had violated the §7 rights of Doulamis under the NLRA, as well as all other allegations.

Thereafter, on February 18, 1994, Chaulk moved that the Commission dismiss the MCAD Complaint because it was preempted by federal labor law. Pet.App.11A.

On May 13, 1994, the Commission issued an Order denying Chaulk's Motion To Dismiss. Pet.App.11A. In that Order, the Commission stated, as the essential basis for denial, that it need not resolve the merits of the underlying labor dispute in order to resolve the Complaint of alleged discrimination. Pet.App.12A.

Respondent filed the present action in the United States District Court for the District Of Massachusetts on December 8,

---

[2] Section 7 of the National Labor Relations Act states, *inter alia*, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . ." "Section 8(a)(1) of the Act also makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in §7".

Section 8(a)(3) of the Act also makes it an unfair labor practice, *inter alia*, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

1994, seeking declaratory judgment as well as an injunction barring the continued prosecution of Doulamis' complaint before the MCAD. Pet.App.12A.

The Massachusetts Commission Against Discrimination filed a Motion To Dismiss, which was granted on February 7, 1994. Pet.App.1A. The decision was appealed by Chaulk to the Court of Appeals for the First Circuit. Pet.App.7A.

On March 22, 1995, Chaulk entered into a binding, non-admission settlement agreement with the National Labor Relations Board resolving all of the complaints of NLRA violations, including those in the Doulamis case. Pet.App.10A.

On November 27, 1995, the decision of the Federal District Court to abstain was reversed by the First Circuit, which held that the MCAD Complaint was preempted by the NLRB proceedings and the abstention doctrine did not apply. Pet.App.7A.

CORRECTIONS OF MISSTATEMENTS IN THE PETITION

1. In the Complaint filed with the MCAD, Doulamis alleges that there were "numerous other male organizers who (were) not being harassed." However, the Petition fails to indicate that Eric Burgess, a male co-worker of Doulamis', who was also involved in the union organizing effort, was a co-author of the pro-union letter submitted to Chaulk management, and was suspended from Chaulk on December 3, 1993.

As part of its non-admission settlement agreement with the NLRB, Chaulk compensated Burgess for the time that he was suspended from Chaulk.

2. The Petition also indicates that the majority of the First Circuit held that "the NLRA pre-empts state anti-discrimination statutes." Pet.28. However, this assertion is misleading. The holding of the court below was that this case involved labor issues exclusively within the jurisdiction of the NLRB and that, regardless of how artfully Doulamis pled her claim to the MCAD, it was preempted by the NLRB pro-

ceedings. At no point in its opinion did the court hold that the NLRA preempts state anti-discrimination statutes.

3. Finally, the Petitioner contends that the majority decision conflicts with a decision rendered by the Massachusetts Supreme Judicial Court, namely *Mass. Electric* v. *Mass. Comm'n Against Discrimination*, 375 N.E.2d 1192 (1978). There, the SJC held that "(d)iscrimination in employment. . . is generally considered to be a 'peripheral concern' of the National Labor Relations Act, and thus, State anti-discrimination statutes are not pre-empted by federal labor law." *Id.* at 1202. Petitioner erroneously contends that the decision of the First Circuit on appeal conflicts with this holding. However, as stated, *supra*, this assertion is a misstatement of the holding of the majority decision below.

ARGUMENT

Petitioner has failed to state any compelling reason upon which the Petition for a Writ of Certiorari should be granted. As grounds for the Petition, Petitioner puts forth two arguments.

First, Petitioner contends the decision of the First Circuit presents an important question that this Court left open in its decision in *New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350 (1989) (hereinafter *NOPSI*). Petitioner argues that the question of whether a facially conclusive preemption claim overrides *Younger* abstention is an issue ripe for consideration on the facts of this case.

Although the Circuit Court mentioned the *NOPSI* case in its discussion of abstention, its rationale for finding that abstention was improper had nothing to do with whether or not the claim presented was one of "facially conclusive" preemption. Rather, the court's rationale for finding that the claim before the Massachusetts Commission Against Discrimination, (hereinafter MCAD), was preempted by exclusive jurisdiction of the NLRB was that, on all the evidence, "under the *Garmon* doctrine" it was "*readily apparent* that the Com-

mission (wa)s acting beyond its jurisdictional authority." Pet.App.36A. (emphasis supplied). Therefore, Petitioner's reliance in this Petition on an issue of "facially conclusive" preemption has no bearing on the decision in this case and does not present a compelling reason for granting the Petition.[3]

Moreover, the *NOPSI* case is irrelevant to the issues presented in the case at bar and any determination as to the Court's holding in that case is misplaced. *NOPSI* was decided under the doctrine of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), *reh'g denied*, 320 U.S. 214 (1943) and not under the doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971), which is the abstention doctrine applicable to the facts of this case. *Burford* and *Younger* are two entirely separate doctrines and theories. Since *Burford* abstention is only required where a concurrent assertion of federal jurisdiction would disrupt a complex state regulatory scheme, not an issue in the present case, any reference to *Burford* abstention and the *NOPSI* case is inapposite.

The second argument put forth by the Petitioner, as compelling grounds for the granting of the Petition, is that the NLRA does not preempt state anti-discrimination laws. However, Respondent does not allege that it does, nor did the majority of the First Circuit so find. The facts of this case, the court held, did not present an anti-discrimination claim. The court did not find, as Petitioner argues, that the NLRB has jurisdiction over discrimination claims. Such an assertion is patently false. What the Court found was that, because the claim raised issues arising exclusively under the NLRA, the MCAD was without jurisdiction in the matter.

Further, the court reasoned, regardless of how diligently Doulamis recharacterizes her original claim before the

[3] It should also be noted, that the Petitioner relies for the first time before this court on the decision in *NOPSI* and has never raised the issues presented in that case in any previous proceeding. In fact, a review of Petitioner's brief filed with the First Circuit, clearly indicates no reliance on the *NOPSI* case, as not a single reference to that case was made on any page thereof.

MCAD, it is a labor relations claim and not a claim of gender discrimination. The court reasoned:

> (i)n the end, no recharacterization of this claim can obscure the fact that, at bottom, this is a classic example of an unfair labor practice claim of the kind traditionally handled in the first instance by the NLRB. Since the controversy before the MCAD and that resolved by the NLRB are the same in a fundamental respect, and the risk of interference with the Board's jurisdiction is obvious and substantial, we hold that the MCAD has no jurisdiction to entertain Doulamis' charge of sexual discrimination based on her employer's alleged interference with her union activities.

(Pet.App.24A-25A) (citing *Local 1926 International Union of Operating Engineers* v. *Jones*, 460 U.S. 669, 674 (1983)).

I. Under the Garmon doctrine, state action is preempted where the conduct in issue is arguably subject to the National Labor Relations Board.

In *Building Trades Council (San Diego)* v. *Garmon*, 359 U.S. 236 (1959), this Court held, "(w)hen an activity is arguably subject to §7 or §8 of the (National Labor Relations) Act, the states as well as federal courts must defer to the exclusive competence of the NLRB if the danger of state interference with national policy is to be averted." *Id.* at 244. "The critical inquiry . . . is not whether the state is enforcing a law relating specifically to labor relations or one of general application, but whether the controversy presented . . . is identical to . . . that which could have been . . . presented to the Labor Board." *Sears, Roebuck Co.* v. *San Diego Dist. Council of Carpenters*, 436 U.S. 180, 197-98 (1978). As the First Circuit held, the facts of this case fit squarely within the four corners of the *Garmon* doctrine.

Respondent does not allege that *all* claims involving *any*

type of labor relations issue is preempted by the jurisdiction of the NLRB. In fact, Respondent recognizes that there are two categories of exceptions to the *Garmon* doctrine. First, where conduct is only of "peripheral concern" to federal labor policy, an exception to Garmon preemption may exist. *Garmon*, 359 U.S. at 243. Similarly, state action is not preempted where the regulated conduct touches interests "so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the states of the power to act." *Id.* However, as the First Circuit so aptly ruled, this case falls within neither of those exceptions.

If Petitioner's assertions were correct, any state with labor laws analogous to the NLRA would have jurisdiction and could oust the NLRB by asserting it. As the Tenth Circuit noted, even when a state is asserting an interest as strong as controlling organized crime, "where, as in this case, a state court is asked to decide issues of federal law in an area in which federal interests predominate, the state's interest in the litigation is in our view not important enough to warrant *Younger* abstention." *Seneca-Cayuba Tribe of Oklahoma* v. *State of Oklahoma*, 874 F.2d 709, 714 (10th Cir. 1989). Accord *California* v. *Cabazon Band of Mission Indians*, 480 U.S.202 (1987); *Sycuan Band of Mission Indians* v. *Roache*, 54 F.3d 535 (9th Cir. 1994), *cert. denied*, __ U.S. __, 133 L.Ed.2d 203 (1995).

"When called to determine whether th(e) exceptions apply, courts must balance the state's interest in remedying the effects of the challenged conduct against both the interference with the NLRB's ability to adjudicate the controversy and the risk that the state will approve conduct the NLRB prohibits." Pet.App.16A, (citing *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 498-499 (1983); *N.L.R.B.* v. *State of Ill. Dept. of Emp. Sec.*, 988 F.2d 735, 739 (7th Cir. 1993)). In determining whether or not these exceptions applied in the present case, the First Circuit focused on the conduct that manifested this controversy.

In viewing the facts, the First Circuit determined that the

essential claim was one within the exclusive jurisdiction of the NLRB, not merely because of the label affixed to it, but, rather, in light of the circumstances surrounding the claim. "It is the conduct being regulated, not the formal description of governing legal standards that is the proper focus of concern." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971). The First Circuit recognized that, if the conduct alleged to have taken place on the part of Chaulk, was "adequately established through competent evidence" it would constitute undue interference with Doulamis' rights under §7 of the NLRA and consequently a violation of §8(a)(1)of the Act." Pet.App.22A. Therefore, the conduct alleged was not only arguably subject to the National Labor Relations Act, but was "obviously prohibited under §8(a) of the Act." Pet.App.19A.

The crux of the claim at issue is whether or not Chaulk interfered with Doulamis' union organizing activities. Under §8(a)(1) of the Act, adjudication of such a practice is clearly within the exclusive authority of the NLRB. Mere insertion of the claim that one believes the action to be based on the fact she is female is not a sufficient basis for taking the case from the purview of the NLRB.

Congress has determined that labor relations are most effectively managed when adjudicated by one tribunal: the NLRB. There is no question, as the First Circuit correctly found *and* the interrogatories issued to Chaulk by the MCAD indicate (Pet.App.23A) that, if the Commission were to invoke its jurisdiction over this claim, it would be entering into the adjudication of an area of law specifically reserved for a federal body.

The Circuit Court's ruling that *Garmon* preemption applied was proper when viewed in light of the facts of this case. It is respectfully submitted that the findings of the panel should not be disturbed.

Clearly, the federal courts have the right to make a decision whether preemption exists and to determine whether or not a state agency, or a state court, has properly determined whether preemption exists in the final instance. *See Mitchell*

v. *Collagen Corp.*, 870 F.Supp. 885, 892 (D.C. Ind. 1994), *aff'd*, 67 F.3d 1268 (7th Cir. 1995), *reh'g denied*, 1995 U.S. App. LEXIS 32924 (7th Cir.1995), wherein the Court held:

> Preemption doctrine results from the duel between sovereigns inherent in a federal system. Whether a statute Congress enacts preempts state law depends on Congress' intent as expressed in the statute, not whether a state agrees that its laws are, or should be, preempted.

A. *The First Circuit did not hold that the NLRB preempts the MCAD in gender discrimination cases.*

The issue in this case is not, and never has been, whether the NLRA encompasses "discrimination based on gender," as petitioner alleges, but, rather, the issue is whether a complaint filed with the Commission, which alleges the Complainant was discriminated against in a union activity because she is a female, necessarily involves the Commission in an interpretation of labor law, and in the question of whether her conduct was "arguably protected" by the NLRA. The First Circuit correctly determined that it did.

There appears to be a fundamental misunderstanding in both the decision of the dissent and in the brief of Petitioner in that both make broad assertions about the rights of the Equal Employment Opportunity Commission (EEOC) and the states to prohibit discriminatory employment practices without focusing upon the appropriately narrow question of whether simply asserting gender is sufficient to take a case outside the ambit of the *Garmon* preemption doctrine. What both fail to take into account is that, when an assertion is made that there has been underlying interference with union activity, and this is the fundamental predicate for the legal action, the NLRB has primary jurisdiction.

B. *References To Title VII And The EEOC Are Also Inapposite In This Case*

What this case specifically does not involve is any conflict with the EEOC and with Title VII. Because the case involves a state statute, the Supremacy Clause of the U.S. Constitution is implicated. As this Court has recently held, "(b)ecause the NLRA's relationship with the State statute implicates the Supremacy Clause, and its relationship where the Federal statute does not, some courts hold that the analysis in the former situation should be stricter than in the latter." *Tamburello* v. *Comm-Tract Corp.*, 67 F.3d 973 n.2 (1st Cir. 1995). Thus, a case involving Title VII would not involve the issue of either *Younger* abstention or *Garmon* preemption. *See also Britt* v. *Grocers Supply Co., Inc.*, 978 F.2d 1441 (5thCir. 1992); *reh'g denied*, 986 F.2d 97 (5th Cir. 1993), *cert. denied*, 508 U.S. 960 (1993).

C. *Comity deference is a two-way street.*

To allow the MCAD to proceed in a case that basically sounds in federal labor law would be to do an ill far greater than that which dissent and Petitioner assert is being done by the majority decision. Were their arguments to be given effect, a federal agency, vested with exclusive jurisdiction over the interpretation and application of federal labor law for the last sixty years, would itself be ousted of jurisdiction and its judgment, its right of interpretation and its right to settle cases would be substantially undermined by the asserted mandatory deference to a state agency with no special expertise in the labor relations field and without any mandate to interpret federal labor law. Because of the assertion of gender, that state agency would thereby be permitted fundamentally to undermine what the federal agency has already accomplished. The NLRB had resolved the issue of whether Doulamis was discriminated against in her union activity regardless of employer motivation. Whether it was a gender based motiva-

tion or not is beside the point. The overriding question is whether there has been discrimination in her *union activity*. That is a federal question.

The misconception which the dissent appears to make is that the MCAD still has the right to decide that same question, but to concern itself with whether there was discrimination against Doulamis in her union activity, this time focusing on the question of whether the employer's motivation was gender based. There can be no getting around the fact that this would heavily involve the state agency in doing the work of the National Labor Relations Board.

II. The Case Was Properly Decided Under Applicable Supreme Court Abstention Doctrine.

In the most extensive and up-to-date analysis of Supreme Court abstention doctrine to date, James C. Rehnquist, in his article *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan. L. Rev. 1049 (1994), pointed out that there are five different types of abstention generally identified by the name of the case that first introduced the particular doctrine. The five, according to his analysis, are as follows:

> Thus, Pullman abstention is required where decision of a federal constitutional issue can be avoided by deferring to a state court's resolution of an unsettled law issue, *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941); Burford abstention is required where concurrent federal jurisdiction would disrupt a complex state regulatory regime, *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); Thibodaux abstention is required, or at least permissible, where a state law issue is unsettled and politically sensitive, *Louisiana Power & Light* v. *City of Thibodaux*, 360 U.S. 25 (1959); Younger abstention is required where the federal defendant has commenced criminal or civil enforcement proceedings in state court against the fed-

> eral plaintiff, *Younger* v. *Harris*, 401 U.S. 37 (1971); and Colorado River abstention requires a federal court to defer in limited circumstances to duplicative, ongoing state court litigation, *Colorado River Water Conserv. Dist.* v. *United States*, 424 U.S. 800 (1976).

Rehnquist, *supra*, at 1050.

Both in the dissent, and in the Brief by the Attorney General by and on behalf of the Massachusetts Commission Against Discrimination (MCAD), the authors confuse *Younger*, *Colorado River*, and *Burford* and mingle the three separate theories of abstention together to assert that a majority of the First Circuit panel decided the instant case incorrectly.

It is respectfully submitted, consistent with the analysis done by Attorney Rehnquist, that different standards are operative, depending upon which doctrine of abstention is being applied. However, it is also submitted that, under the *Younger* doctrine particularly, it is inappropriate to characterize abstention as mandatory. As Rehnquist notes, Justice Black properly characterized abstention as a comity doctrine and relegated it to the status of a mere "notion" in the *Younger* case. *Younger*, 401 U.S. at 37 n.101; Rehnquist, *supra*, at 1066. Justice Frankfurter also referred to the concept of comity as "fluid" and "ill-defined." *Williams* v. *North Carolina*, 325 U.S. 226, 228 (1945), *reh'g denied*, 325 U.S. 895 (1945).

It should be noted, incidentally, that the Supreme Court explicitly rejected *Burford* abstention in the cases of *Colorado River* and in *NOPSI* as well. The Court in the *Colorado River* case found that federal decision of state law issues would not "impair efforts to implement state policy as in *Burford*." *Colorado River*, 424 U. S. 800 n. 163. In *NOPSI*, the court found that *Burford* abstention was improper where federal adjudication of the federal preemption issue would not disrupt state efforts to ensure administrative uniformity and that federal adjudication did not require expertise in local facts or policies. *NOPSI*, 491 U.S. at 350 n. 165.

The citation to *NOPSI* is particularly inappropriate where the court decided that the *Younger* abstention doctrine did not apply in that particular case. Therefore, any references to how *Younger* might be applied in the instant case invoke mere dicta. Confirmation of this interpretation of the *NOPSI* case and its inapplicability to the present case is contained in the decisions of the First Circuit in *Trailer Marine Transport Corp.* v. *Rivera-Vazquez*, 931 F.2d 961 (1st Cir. 1991) and that of *Fragoso* v. *Lopez*, 991 F.2d 878 (1st Cir. 1993). Accord *Hazardous Waste Treatment Council* v. *South Carolina*, 945 F.2d 781, 788 n.10 (4th Cir. 1991); *Evans* v. *Dale*, 896 F.2d 975 (5th Cir. 1990), *reh'g denied*, 1990 U.S. App. LEXIS 6352 (5th Cir. 1990); *Norfolk & Western Railway Co.* v. *Public Utilities Commission of Ohio*, 926 F.2d 567, 572 (6th Cir. 1991), *reh'g denied*, 1991 U.S. App. LEXIS 7104 (6th Cir. 1991) (stating, "in *NOPSI*, the Supreme Court did not address the issue of the application of the abstention doctrine to a pending or ongoing state administrative proceeding." *Allegheny Corp. v. Haase*, 896 F.2d 1046 (7th Cir. 1990), *reh'g denied*, 1990 U.S.App. LEXIS 5250 (7th Cir. 1990). Hence, the heavy reliance placed by both the dissent and by defendant-appellee upon the *NOPSI* decision is clearly misplaced.

Moreover, the petitioner erroneously states that the Supreme Court has made it clear that, even when a court is faced with a claim of preemption, abstention under *Younger* is "nevertheless required when the plaintiff is seeking to enjoin a pending state administrative proceeding" Pet.6. This simply is not the law, since that statement does not recognize the exception which even the *NOPSI* case permits and which the case of *Bud Antle, Inc.* v. *Barbosa*, 35 F.3d 1355 (9th Cir. 1994), *modified*, 45 F.3d 1261 (9th Cir. 1994) makes manifest, namely, that, where preemption is "readily apparent", abstention is improper. Here, just as in that case, it is "readily apparent" that the *Garmon* doctrine ousts the MCAD of jurisdiction. The reason for this is not, as the dissent assumes and Petitioner avers, that the NLRA preempts state anti-

discrimination laws or ousts the EEOC of jurisdiction, but it is because it is readily apparent that the *case* which Doulamis seeks to bring is preempted under the *Garmon* doctrine.

CONCLUSION

It is respectfully submitted that Petitioner has failed to state any grounds, based on the facts of the instant case, upon which to compel this honorable Court to grant the Writ of Certiorari. It is submitted that Petitioner's request be denied.

Respectfully submitted,

ARTHUR P. MENARD
MENARD, MURPHY & WALSH
One Financial Center
Boston, MA 02111
(617) 832-2500

Dated: May 17, 1996